

Firmat Manufacturing Corp. and Louis A. Martinez and Ann Columbo and District 65, Distributive Workers of America. Cases 22-CA-9279, 22-CA-9288, 22-CA-9387, 22-CA-9415, and 22-RC-7923

April 24, 1981

DECISION AND ORDER

On October 15, 1980, Administrative Law Judge Julius Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.¹

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,² and conclusions of the Administrative Law Judge and to adopt his recommended Order,³ as modified herein.

The Administrative Law Judge sustained the challenge to James Callahan's ballot on the basis that he was primarily a student and was not eligible to vote in the representation election as an employee within the meaning of Section 2(3) of the Act. In so doing, the Administrative Law Judge found that Respondent's relationship with Callahan was an educational rather than an employment relationship.⁴ No exceptions were filed to this finding.⁵ The Administrative Law Judge further found that James Callahan, while not eligible to vote in the representation election, was entitled to reinstatement with backpay as a result of his discharge in violation of Section 8(a)(1) and (3) of the Act.

Respondent excepted to the Administrative Law Judge's finding that Callahan's discharge was violative of Section 8(a)(1) and (3), contending that, based upon the Administrative Law Judge's findings, Callahan was not an employee within the meaning of Section 2(3) of the Act and was not entitled to the protections of the Act. We agree with Respondent's exception only insofar as Callahan is not an employee within the meaning of Section

2(3) of the Act.⁶ We agree with the Administrative Law Judge, however, that in order to remedy fully Respondent's violations of the Act, it is necessary to restore the *status quo ante* by ordering the reinstatement of James Callahan.

As set forth more fully by the Administrative Law Judge, in January 1980, Respondent's employees, upset with their working conditions, attempted to meet with Respondent's president to discuss the problems. When these efforts were not successful, the employees decided to meet with a representative of the Union. The following day Respondent's supervisor interrogated an employee about the union meeting. Two days later Respondent's president called a plantwide meeting and inquired as to which employees were involved with the Union, solicited grievances, told the employees they did not need a union, and threatened to close the shop. Respondent's president then, *inter alia*, granted a wage increase, an extra holiday, longer breaktime, and overtime pay. Respondent then proceeded to discharge one employee the day the employee signed a union authorization card, decrease the overtime of another employee who complained about the discharge, and threaten to fire other employees. During the month that James Callahan was hired and the following month, Respondent unlawfully interrogated employees, threatened to fire employees, denied overtime and a wage increase, discriminatorily rearranged working hours, promulgated a broad no-solicitation rule, and threatened to close the shop if the Union won the election. Furthermore, Respondent unlawfully discharged five employees, in addition to Callahan, for their participation in union activities.

In the midst of these unlawful activities, Callahan was hired in accordance with the cooperative education program at the local high school. He was paid an apprentice wage and was to work full time during the summer and part time during the school year, with steady employment upon graduation. During his second day of employment, Callahan was informed about the Union and offered a union button by an employee. Respondent's supervisor intervened, however, telling Callahan he could not wear a union button because he was an apprentice and only learning. Later that day, Callahan was asked to join the Union by another employee, but was told by Respondent's supervisor he could not sign an authorization card because he did not yet work there. Respondent's supervisor then questioned Callahan about his conversation earlier that day concerning the Union. By the end of the day, Callahan had signed an authorization card.

¹ Respondent's request for oral argument is hereby denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

² Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

³ In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

⁴ See *Towne Chevrolet*, 230 NLRB 479 (1977).

⁵ In the absence of exceptions thereto, Chairman Fanning adopts *pro forma* the Administrative Law Judge's finding that Callahan's relationship with Respondent was an educational rather than an employment relationship.

⁶ See *Towne Chevrolet*, *supra* at fn. 4.

Two weeks later Callahan was told he was being laid off due to lack of work. The next week he was placed on indefinite leave.

The Administrative Law Judge found that Callahan's discharge was a result of his union activity and was therefore violative of Section 8(a)(1) and (3) of the Act. Respondent argues that, because Callahan was found by the Administrative Law Judge to have an educational rather than an employment relationship with Respondent and is therefore not an employee within the meaning of Section 2(3) of the Act, he cannot be afforded the protections of the Act. We disagree.

In an analogous situation, the Board has long held that under normal circumstances a supervisor is not entitled to the protections of the Act because supervisors are not employees within the meaning of Section 2(3) of the Act. However, in a consistent line of cases, the Board has held that an employer violates Section 8(a)(1) when it discharges or discriminates against a supervisor for union-related considerations because such acts interfere with the rights of nonsupervisory employees who become aware of the discrimination and are therefore coerced and restrained in the enjoyment of their own statutory rights.⁷ The Board has subsequently applied this principle to cases where the discharge of a supervisor was "an integral part of a pattern of conduct aimed at penalizing employees for their union activities" *Miami Coca Cola Bottling Company doing business as Key West Coca Cola Bottling Company*, 140 NLRB 1359, 1361 (1963).⁸

Applying this principle to the instant situation, Callahan, while occupying an educational rather than an employment relationship with Respondent and therefore not an employee within the meaning of Section 2(3), should be accorded the protections of Section 8(a)(1) of the Act. His discharge, together with the discharges of five individuals who were employees within the meaning of Section 2(3), occurred as a result of union-related activities. Furthermore, Callahan's discharge occurred during the time period when the Employer was engaged in a widespread variety of unfair labor practices against individuals who were employees within the meaning of Section 2(3) including, *inter alia*, interrogations and closure threats.

From the foregoing, it is clear that Callahan's termination was more than simply contemporaneous with the terminations of the other union members and the surrounding unlawful conduct. Rather, Respondent's discharge of Callahan was an

integral part of a pattern of conduct aimed at ridding the shop of union adherents and penalizing employees for their union activities.

We therefore find that the discharge of James Callahan violated Section 8(a)(1) of the Act, and adopt the Administrative Law Judge's recommendation that our remedial order provide for Callahan's reinstatement.⁹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Firmat Manufacturing Corp., Englewood, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order,¹⁰ as so modified:

1. Substitute the name "James Callahan" for "Joseph Callahan" in paragraph 2(a).

2. Substitute the following for paragraph 1(j):

"(j) Discharging or otherwise discriminating against employees or any individual who is associated with Respondent in an educational program because of their union activities."

3. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the proceeding in Case 22-RC-7923 be, and it hereby is, remanded to

⁹ In light of the finding that Callahan's discharge was violative of Sec. 8(a)(1), we find it unnecessary to pass on the question of whether his discharge was also violative of Sec. 8(a)(3) of the Act.

Member Zimmerman would grant Respondent's exception to the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(1) and (3) of the Act by discharging James Callahan. The Administrative Law Judge found that Callahan was a student, and not an employee within the meaning of Sec. 8(a)(1) of Sec. 2(3) of the Act, to which no exception has been taken. He therefore is not entitled to the protections of Sec. 8(a)(1) or (3). Member Zimmerman finds inapposite those cases that have ordered the reinstatement of statutory supervisors on the ground that their discharge was an integral part of a pattern of conduct aimed at penalizing employees for protected activities. The Board today orders the reinstatement of five employees who were discharged for their protected activities, and orders Respondent to take other affirmative action with respect to other violations properly found. These remedial actions should make clear to Respondent's employees that they may engage in protected activity without fear of reprisal by Respondent. It should, by our Order, be made equally clear to Respondent that it may not, with impunity, violate the right of its employees to engage in union activity. Therefore, Member Zimmerman would dismiss the complaint insofar as it alleges that the discharge of Callahan violated Sec. 8(a)(1) or (3) of the Act.

¹⁰ The Administrative Law Judge has ordered that a revised tally of ballots, including the count of the ballots, be served on the parties, and an appropriate certification be issued. We note, however, that on July 11, 1980, we ordered that a hearing be held on certain objections to the conduct of the election in this case. We have been administratively advised that the hearing has been conducted but the Hearing Officer's report disposing of these objections has not yet issued. The Regional Director is directed to withhold issuance of the appropriate certification until such time as the election objections have been resolved.

⁷ *Better Monkey Grip Company*, 115 NLRB 1170 (1956).

⁸ See also *Southern Plasma Corporation*, 242 NLRB 1223 (1979), and *Donelson Packing Co., Inc. and Riegel Provision Company*, 220 NLRB 1043 (1975), *enfd.* 569 F.2d 430 (6th Cir. 1978).

the Regional Director for Region 22 for further appropriate action consistent herewith.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we have violated the National Labor Relations Act and we have been ordered to post this notice and to carry out its terms.

WE WILL NOT coercively interrogate employees concerning union activities.

WE WILL NOT create the impression that we have kept the activities of our employees under surveillance.

WE WILL NOT promise and grant wage increases and other benefits in order to discourage our employees from selecting District 65, Distributive Workers of America, to represent them.

WE WILL NOT threaten to close our business if our employees select that Union to represent them.

WE WILL NOT threaten employees with loss of their jobs should they select the Union to represent them.

WE WILL NOT solicit grievances from our employees in order to discourage their activities on behalf of the Union.

WE WILL NOT refuse to permit employees to wear union buttons or other insignia.

WE WILL NOT prohibit solicitations by our employees on behalf of the Union during non-working hours.

WE WILL NOT admonish our employees of the futility of their selecting the Union to represent them.

WE WILL NOT discharge or otherwise discriminate against any employee or any individual who is associated with us in an educational program because of that employee's union sympathies or activities, or because any employee filed or was named in charges under the Act.

WE WILL NOT in any like or related matter interfere with, restrain, or coerce our employees in the exercise of rights guaranteed to them by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to Louis Martinez, Joseph Lanusse, Michael Tomasch, James Callahan, Ann Colom-

bo, and Michael Colombo, to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and **WE WILL** make them whole with backpay, plus interest.

WE WILL make whole Louis Martinez, Scott Reimer, Ann Colombo, Michael Colombo, and Karl Bertram for any other losses they may have sustained because of the unlawful changes we have made with regard to their working conditions.

FIRMAT MANUFACTURING CORP.

DECISION

STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge: This proceeding was heard by me in Newark, New Jersey, during December 17-20, 1979, and January 2 and 3, 1980. Upon charges filed by Louis A. Martinez and Ann Colombo and duly served on Firmat Manufacturing Corp., herein called Respondent or the Company, the Regional Director for Region 22 issued complaints, which were consolidated and amended on August 30, 1979. The complaints allege various violations by Respondent of Section 8(a)(1), (3), and (4) of the Act.

A petition in Case 22-RC-7923 having been filed by District 65, Distributive Workers of America, herein called the Union, on June 19, 1979, pursuant to a Stipulation for Certification Upon Consent Election approved July 12, 1979, an election by secret ballot was conducted on August 6, 1979, among the employees in a stipulated appropriate unit. The tally of ballots revealed that of approximately 16 eligible voters, 5 cast votes for, and 3 cast votes against the Union, 1 ballot was void and 7 ballots were challenged. The challenged ballots, accordingly, were sufficient to affect the results of the election. Thereafter, Respondent timely filed objections to conduct affecting the results of the election. The Regional Director having found that Respondent's objections did not raise substantial or material issues regarding conduct affecting the results of the election, overruled them. However, in his report dated October 17, 1979, supplemented by an erratum issued December 13, 1979, the Regional Director resolved one of the challenges and found that the issues raised by the challenges to six other ballots may best be resolved by a hearing, and accordingly issued an order consolidating those matters with the then-consolidated unfair labor practice complaints.

Respondent filed an answer denying the commission of unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. The General Counsel and Respondent submitted briefs which have been carefully considered. Upon the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a New Jersey corporation, has a principal office and place of business in Englewood, New Jersey, where it is engaged in the manufacture, sale, and distribution of precision tools. During the calendar year preceding the issuance of the complaints herein, Respondent manufactured, sold, and shipped from its Englewood plant products valued in excess of \$50,000, of which products valued in excess of \$50,000 were shipped from that plant to customers located outside the State of New Jersey. The complaint alleges, Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Respondent operates a job shop in which it engages in precision machining and grinding. Its approximately 16 employees operate various machines and tools. The president and owner of the business is Frederick Mathes. The plant manager is Peter McKeown and the shop foreman is Zigfried Lehman. In the office at the time of the events that will be described herein, there was one combination secretary-bookkeeper, Ann Colombo, one of the Charging Parties.

During December 1978 and the beginning of January 1979, the employees in the plant, being considerably upset with conditions principally because of Foreman Lehman, who they claimed was harassing them, discussed what they could do to remedy their situation. In early January the employees met and composed a list of their various complaints, and decided that Louis Martinez and Howard Carter should present their proposals to Mathes. During the first week of January, Martinez and Carter saw Mathes, in the presence of Plant Manager McKeown. They had set forth some requests in writing and gave the list to Mathes, who promised to see them about these matters in a few days. According to Martinez, he and Carter sought out Mathes several days later, but Mathes would not see them without an appointment which they could make through McKeown.

As it appeared to the employees that they were not being successful with their approaches to Mathes, they discussed the idea of joining a Union. As a result Martinez set up a meeting with representatives of the Union at the house of his father, who was a member of this particular Union. At the meeting the various advantages of joining a union were presented to them by the union representatives, who also distributed authorization cards to the employees who were present. They decided, however, not to sign cards at that time because they would rather wait until they could meet with Mathes.

During the evening of this meeting and while it was still going on, Ann Colombo, the secretary in the office,

received a call at home from Mathes. Ann Colombo's husband, Michael, was an employee and was at that moment attending the meeting. Mathes asked her where the meeting was being held and whether her husband had come home yet. Mathes did not deny this conversation but rather stated that he made the call because Ann had "volunteered" to inform him about the meeting and report what had taken place. Of course she reported to her husband and Louis Martinez that she had received the call from Mathes. In this regard Michael Colombo testified credibly, and without contradiction, that Lehman came up to him at work the following day and made some remark about "... some secret meeting." He told Colombo that the Company knew about the meeting the night before and where it was held and who attended. He further said that the employees would not get anywhere or would not get anything they did not already have.

The employees' meeting was on Wednesday and that Friday Mathes called a meeting with all the employees in the plant. Ann Colombo was also present at the meeting and as secretary, she took notes. According to Ann Colombo, as well as her husband, when Mathes inquired as to which employees were involved with the Union, someone responded everyone except management. He also asked who had grievances. A number of employees testified, including Martinez, Joseph Lanusse, and the Colombos that Mathes told the employees they did not need a union, they would not get anything out of it, and he would not accept the Union but rather would close the shop. Mathes went over all of the employees' suggestions and informed them that he would grant a 5-percent wage increase; give them one extra holiday; extend their breaktime by 5 minutes; and pay overtime after 8 hours in 1 day. He said that he could not do anything about their other suggestions but did promise to meet with them every 3 months and give another wage increase in April. His proposals were implemented and all employees except Martinez obtained a 5-percent wage increase the following week. When Martinez protested, Mathes stated he had agreed in November to give him a wage increase effective January and that was it.

Lanusse testified that a short time after the conclusion of this meeting, Mathes came to him while he was working at his machine and inquired as to what was going on. Lanusse merely said that morale was low because of the conduct of Lehman. Mathes asked who the ringleaders were to which Lanusse replied that he did not know.

The witnesses are in agreement that thereafter things were quiet for a few months until April when Mathes entered a hospital for treatment of a heart condition, and Lehman recommenced his harassing tactics.¹

In May, the employees were not only having problems with Lehman, but also had not received the pay raise or the employees meeting promised for April, and therefore they again began discussing the possibility of bringing in a union. Scott Reimer testified that on or about May 30,

¹ It appears that the employees complained about Lehman's habit of setting one against the other, giving them useless work, changing their machines, and actually playing little tricks and games with them to their annoyance and detriment.

he had a conversation with McKeown, with respect to various problems, and he was told that anybody could be fired in the shop. On the same day Joseph Lanusse signed an authorization card and on the following day, May 31, he was discharged for refusing to train Howard Carter on the centerless grinder machine.² A short time after Lanusse's discharge, Michael Colombo's overtime was cut. Apparently he had complained to Lehman and was told to mind his own business.³

As a result of Lanusse's discharge, the employees attended a union meeting arranged by Martinez and authorization cards were signed. On June 19, a representative of the Union, Acosta, accompanied by a number of the employees, visited the plant and demanded recognition. In addition, some of the employees commenced wearing union buttons or insignia.

Martinez filed the first charge herein on June 5, alleging the discharge of Lanusse and Colombo's cut in overtime among other things. On the day the charge was received by Respondent, according to Martinez, Lehman asked, "What the hell did you do that for." Lehman said that he was talking about "the letter." Lehman also told Martinez that he would not be getting overtime but only straight time from then on. Martinez spoke to McKeown concerning a cut in overtime and McKeown replied by telling him that Mathes had received the charges he filed at the Labor Board. Payroll records reveal that Martinez thereafter worked no overtime. In fact, Ann Colombo testified that on the day Mathes received the charges he told McKeown to fire Martinez, but when counseled against that procedure by McKeown, Mathes said just cut his overtime.

McKeown acknowledged in his testimony that on the day that the charge was received he brought each employee into the office and asked if he knew that his name was being used in the charge. McKeown stated that some said they did not know while others said they did. He asked them to sign letters concerning this, but they refused. Thereafter Mathes sent letters to all employees, except one, thanking them for having denied giving Martinez permission to use their names in the charge. One employee, Karl Bertram, had admitted giving permission for the use of his name, and he received a different letter. Oddly enough McKeown's testimony indicated that more than one employee had admitted giving permission and yet Bertram was the only one who received that type of letter.

Martinez was on vacation during the week commencing June 11 and on that date filed another charge at the Board alleging his overtime had been cut for discriminatory reasons. Upon receipt of that charge, Respondent sent Martinez a telegram telling him to take his full vacation despite the fact that, by agreement with the Company, Martinez had retained several days of vacation to be

utilized at a later date when his wife was due to give birth. Respondent, in its telegram, directed him to stay on vacation until June 25 because of lack of work. Martinez instead came back to the plant on June 18 and saw Lehman working on his machine and observed that there was plenty of work available. According to Martinez, Lehman told him this action was taken because he had caused a lot of trouble for Mathes, and McKeown told him the boss had ordered that he, Martinez, was not to return until June 25.

As previously noted, the Union demanded recognition on June 19 when the representative and a number of employees together made this request. Commencing June 20 Scott Reimer was cut back in his overtime. The payroll record disclosed that while he continued to have some overtime hours, there appeared to be a substantial cut presumably by the elimination of Saturday work. In addition Reimer's work hours were changed. Previously Respondent had agreed that he could start his workday at an earlier hour so as to avoid heavy traffic in his trip to the plant. On the same day Lehman told Michael Tomasch not to wear a union button, and his employment was terminated at the end of that day by McKeown. Likewise Lehman later told Tomasch's replacement, James Callahan, an apprentice, that he could not wear a union button.

On June 26, a number of the employees were outside the plant for their afternoon break. Michael Colombo became involved in an argument with another employee, John Tipton. Mathes came by, and in the process of telling Colombo to shut up, the two then began a loud argument, exchanging epithets. Several employee witnesses including Martinez, Tomasch, and Howard Carter, who were present, stated that the exchange between Mathes and Colombo was initiated by Mathes, that Mathes finally went inside, and a few minutes later McKeown came out and told Colombo to punch out as he was being fired for threatening the life of Mathes. This account is somewhat contrary to the testimony of McKeown who stated that he actually came out while Colombo and Mathes were still embroiled, separated them, and escorted Mathes to the office. I credit the employees' version of this incident, particularly Carter, who was a reluctant witness as he is still employed. Moreover McKeown was not corroborated by Mathes. That night McKeown communicated with Ann Colombo and told her that on advice of counsel, Mathes decided not to fire Michael and he was to return to work the following day.

According to Colombo in early July, unlike other employees, he was not given an opportunity to make up for time lost at work due to the gasoline shortage, nor was he given overtime work which others received. In addition Ann Colombo stated that immediately after her husband introduced her to a union representative at lunchtime one day outside the shop, Mathes asked her what was going on and then demanded the return of the keys to the office. When she asked him if she was being fired, he said that he could do that whenever he felt like it. Instead, Mathes changed her hours which made it inconvenient because she would be unable to drive her husband to work.

² In order to avoid repetition, the facts and circumstances concerning this and other discharges to be discussed will be set forth in connection with the issue as to whether these discharges violated the Act.

³ Most employees had been receiving overtime in varying amounts. The payroll records show that for the week ending June 2, 1979, Michael Colombo had 2 hours of overtime. Thereafter for the weeks ending June 9, 16, 23, and 30, Colombo received no overtime although the same records show that other employees continued to receive overtime opportunities.

Other employees such as Scott Reimer stated that Mathes would not give him a wage increase as promised for July 1 because the presence of the Union created a freeze on wages. Martinez, after complaining about his loss of overtime, was told by Lehman that his work hours were also changed. As with the Colombos', this created problems because Martinez came to work with his wife whose place of employment was near Respondent's plant. After Martinez' wife changed her work hours to correspond with his new work schedule, Lehman offered Martinez an opportunity, which he now could not accept, to work longer hours. Lehman told him Respondent had been advised by the lawyers that if he refused overtime, he would not be entitled to anything when his case came to hearing.

About July 7, Martinez spoke with Acosta, the union representative, outside the shop during lunchtime. Martinez testified that on returning to the office McKeown told him "from now on, you are not to talk to any of the men in the shop anymore." Martinez claimed he was entitled to talk to the men on his own time, but McKeown said he was being warned that if he was caught talking to the men he would be fired. McKeown went further and told Martinez he could file all the charges that he wanted to because "they don't mean" McKeown said the lawyers had taken care of everything, and the Board would rule in the Company's favor. Martinez further testified that later the same day McKeown told him if the Union won the election, they were going to shut down because Mathes would never bargain with the Union. Martinez also testified that in mid-July he had an argument with Mathes, who threatened him with firing and told him "I don't give a . . . about you, your charges, your Labor Board or nothing." Mathes said his lawyer would take care of everything.

With regard to these conversations with Martinez, I do not credit either McKeown or Mathes. McKeown in his testimony did not allude directly to the conversations described above with Martinez. However, on cross-examination he did deny generally telling employees that Mathes said he would padlock the door if the Union came in. McKeown was an evasive witness with regard to certain key testimony and indeed incredible with respect to the termination of Tomasch, when he said there was no work available. In his testimony, Mathes did not mention the conversation of July 17 with Martinez when he argued with him and threatened to fire him.

Michael Colombo stated that several times Lehman told him they could file all the violations they wanted but would not get anywhere because Respondent would just lock the door. Carter also testified that Lehman told him Mathes would not let a union in and would padlock the door before it came. In addition, Lehman and Mathes questioned him as to what the Union could do for him. This testimony was undenied on the record since Lehman did not appear and testify.

Both Scott Reimer and Michael Colombo were laid off on July 20. Several days later Lehman asked Martinez where his buddies were, and told him that the Union would not do anything for them. Martinez also was told by Lehman he would be an assistant foreman if he were not involved in all this. Martinez, himself, was dis-

charged on July 25 for allegedly having threatened Lehman with bodily harm. Tomasch, who had been a student employed in a work study program, was terminated on June 20 because his program had run out, according to Respondent. James Callahan replaced Tomasch under the same work study program, but was discharged after 2 weeks, because allegedly there was no work. Ann Colombo was discharged on July 27, and her husband, Michael, who had been on layoff since July 23, was also discharged on July 27.

B. The Alleged 8(a)(1) Violations

1. Interrogations

Howard Carter, whom I have found to be credible, stated that he was frequently questioned by both Mathes and Lehman as to what the Union could do for him, and in the context of Lehman telling him that the plant would be closed, such interrogation is coercive and violates Section 8(a)(1) of the Act, and I so find.

Mathes asked Ann Colombo if she knew anything about the charge which had just been received on or about June 6. Martinez was asked by Lehman, on the same day what the hell did he do that for, obviously referring to the filing of an unfair labor practice charge. As far back as January 1979, Mathes admittedly telephoned Ann Colombo and asked her where the union meeting was being held and whether her husband had returned yet. I do not credit Mathes' explanation that Ann had "volunteered" information concerning her husband's involvement in the union activity. After having apparently seen Michael Colombo introducing his wife to the union representative just outside the shop at lunchtime, Mathes asked Ann Colombo "what the story is, where he stands and what was going on." At the same time he asked her for the keys to the office. All these incidents are additional violations by Respondent of Section 8(a)(1) of the Act, as they involve coercive interrogation of employees concerning their union activities and those of other employees.

Finally, Respondent's admitted interrogation of a number of employees by McKeown, who called them individually to his office and asked whether they were aware that their names had been mentioned in an unfair labor practice charge and whether they had given Martinez permission to use their name, constitutes a clear violation of Section 8(a)(1) of the Act as coercive interrogation. Such conduct interferes with employee rights under the Act and particularly inhibits employees in their rights to file charges or be included in charges filed with the Board. This violation obtains, regardless of the motivation of the employer who engages in this type of interrogation.⁴

2. Surveillance and the impression of surveillance

As I do not credit Mathes' assertion that Ann Colombo "volunteered" to inform him concerning the union activities of her husband and his friends, I find that by call-

⁴ *Donald E. Hernly, Inc.*, 240 NLRB 840 (1979); *Continental Chemical Company*, 232 NLRB 705, fn. 4 (1977).

ing Ann Colombo and soliciting information from her concerning the meeting that night, Mathes in effect engaged in actual surveillance. Since his questions to her revealed that he knew a meeting was taking place, this created the impression of surveillance. On the next day Lehman told Michael Colombo the Company knew that the employees had held a meeting the night before and where it was held, again creating the impression that Respondent kept under surveillance the union activities of the employees. This conduct has a coercive impact which inhibits employees in the exercise of their Section 7 rights and accordingly violates Section 8(a)(1) of the Act.⁵

3. The promise and grant of benefits

Although in early January Mathes had been presented with a list of complaints or grievances by Martinez and Carter, nothing was done until the employees met with a view to joining a union, a meeting of which Mathes was aware. He immediately called an employees' meeting of his own and granted a 5-percent immediate wage increase, overtime after 8 hours, an additional holiday, and extension of breaktime. The timing of these changes was such as to induce the employees not to go further in their efforts toward unionization. Indeed the subject of union was brought up by Mathes during the meeting when he made his statements that a union was not needed and indicated he would close his doors if a union actually did come in. In addition, Mathes agreed to hold a meeting in April and quarterly thereafter and grant another wage increase in April. That Mathes was successful in stalling off further activity is demonstrated by the agreement of all parties in this record that conditions were very quiet in the plant for several months thereafter, until the employees realized they were not receiving the promised wage increase in April. I find by granting benefits in January after it became aware of the employees' activities and promising additional benefits thereafter, Respondent violated Section 8(a)(1) of the Act.⁶

4. Threats

Upon the credited evidence, I find that, at the meeting with the employees in January 1979, Mathes threatened employees that he would padlock the doors if the Union came in. This threat was reiterated during the ensuing months by McKeown who told Martinez in early July that the plant would shut down if the Union won the election, and on several occasions by Lehman to Colombo, and most particularly to Carter, whom he told that Mathes would never let a Union in, but would padlock the door first. It has been long established that threats of plant closure clearly violate Section 8(a)(1) of the Act. *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618-620 (1969). Therefore by threatening plant closure Respondent violated Section 8(a)(1) of the Act.

On various occasions Respondent by Mathes, Lehman, or McKeown threatened employees directly or impliedly with discharge. After Mathes noticed that Ann Colombo

had been introduced to a union agent immediately outside the plant, he took away her keys and told her he could fire her whenever he wished. After several employees were terminated in July, Lehman asked Martinez where his buddies were, and then told him the Union could do nothing for these people. This type of conversation implies a threat that Martinez could be subjected to the same treatment. Martinez was also threatened by McKeown with discharge if he spoke with other employees in the plant. Accordingly, by threatening discharge to employees, Respondent further violated Section 8(a)(1).

5. Solicitation of grievances

During the January meeting Mathes also told the employees that he would hold quarterly meetings, clearly indicating to them that, as was the case at that meeting, they could present complaints or grievances to him for his consideration. Months later in telephone calls to the Colombos, and in speaking to Michael Colombo at the plant, Lehman suggested that employees select a two-man delegation to speak to Mathes concerning their problems. He frequently stated that things could and should be worked out in this manner. I find that this conduct violates Section 8(a)(1) of the Act, as the solicitation of employees to resolve their grievances directly, in order to discourage further union activity, violates the Act.⁷

6. Union insignia

The testimony of Tomasch and Callahan is uncontradicted that Lehman told them that they could not wear union buttons. Employees have the right to wear insignia on behalf of the Union unless the Company establishes special circumstances which Respondent has not done in this instance. Accordingly, by maintaining an overly broad rule as to the wearing of union insignia, I find that Respondent violated Section 8(a)(1).⁸

7. Futility of union organization

From the outset Respondent sought to make it clear to its employees that it would be futile for them to opt for union representation. Thus, at the January meeting, Mathes told them they would get nothing out of the Union. Of course this statement was made in the context of his granting some benefits already found to be violative of Section 8(a)(1). Thereafter, in July McKeown told Martinez that Mathes would never bother with the Union and, if necessary, would take a vacation and not talk to them. Lehman reinforced this in his statements to Colombo and Carter that Mathes would lock up the plant and would not deal with a union. Respondent extended this sense of futility with respect to the unfair labor practice charges that had been filed by Martinez. It will be recalled that, in early July, McKeown told Martinez that charges with the Board "mean . . . and the Company would win because they paid thousands of dol-

⁵ *Hedstrom Company, a subsidiary of Brown Group, Inc. v. N.L.R.B.*, 558 F.2d 1137, 1144 (3d Cir. 1977).

⁶ *Hamilton Avnet Electronics*, 240 NLRB 781 (1979).

⁷ *York Division, Borg-Warner Corporation*, 229 NLRB 1149 (1977).

⁸ *Davison-Paxon Company, a Division of R. H. Macy and Company, Inc.*, 191 NLRB 58 (1971).

lars to the government." Mathes told Martinez that he did not care about the Board or charges. Lehman told Colombo that they were not going to get anywhere with their charges.

Such statements, as described above, reflecting the futility of selecting a bargaining representative, are clearly violative of Section 8(a)(1) of the Act, and I so find.⁹

8. The rule against solicitation

Martinez testified credibly that McKeown told him he was not to talk to employees in the shop. Although Martinez protested, claiming he had the right to talk to employees on his own time, McKeown insisted he was not to do this. While McKeown stated in his own testimony that he merely told Martinez to stay by his machine and not talk to others who were working on their machines, I do not credit him in view of the circumstances and the atmosphere prevailing at that time.

It has long been held that "time outside working hours whether before or after work, or during luncheon or rest period, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on Company property." A rule prohibiting this activity is violative of Section 8(a)(1) of the Act, absent evidence of special circumstances making the rule necessary.¹⁰

C. The Alleged 8(a)(3) and (4) Violations

1. Louis Martinez

In any discussion of the termination of employees by Respondent in this case, the situation of Martinez must be considered first because his activities clearly overshadow those of all other alleged discriminatees. He clearly was the most active union protagonist, commencing with discussions early in 1978 and in December 1978 through meetings in January and thereafter. He and Carter were the bearers of the list of complaints and grievances presented to Mathes in early January, Martinez being the spokesman. In addition, he also arranged for union meetings in mid-January, as well as later, and for representatives of the Union to meet and speak with the employees. Moreover his activities were well known to Respondent. Suffice it to say that Mathes, in a moment of candor during his testimony, stated that he felt that "Martinez was going to try to take over his shop." Mathes said that other employees had been with him a long time, but he thought that Martinez was dragging them along. Accordingly, Martinez was pinpointed for reprisals from the onset. Mathes at the meeting in mid-January granted all employees a 5-percent wage increase, but Martinez was the only one that did not receive it. Although Respondent contended that Martinez was not given this raise because he had been granted a wage increase in November 1978 effective January 1979, I do not find that reason to be valid. Clearly the November increase was personal to Martinez, whereas the January 5-percent raise was a general one to all employees. I find that its denial of the 5-percent increase in January to

Martinez was the result of his activities in bringing about the union meeting held 2 days before Mathes met with the employees and granted them the benefits, and therefore in violation of Section 8(a)(1) and (3) of the Act.

Respondent additionally violated Section 8(a)(3) and (4) of the Act when it cut the overtime of Martinez immediately following receipt of Martinez' first unfair labor charge filed on June 5. Both Lehman and McKeown told Martinez that was the reason for the cut in overtime. Respondent contends that the overtime cut was because of lack of work, but the payroll records reveal that other employees who worked overtime regularly, as did Martinez, continued to do so, with the exception of a few whose situations will be discussed hereinafter.

Respondent's conduct towards Martinez continued in the same vein. Thus by forcing an extension of his vacation in June, it prevented Martinez from using several days of vacation which he was preserving for the time when his wife was due to give birth. In early July, Respondent changed his working hours although it was aware that he would have transportation problems because he commuted regularly with his wife. After his wife changed her hours, Respondent then, through Lehman, offered Martinez overtime when it knew he would be unable to comply. This form of harassment and discriminatory treatment additionally violates Section 8(a)(3) and (4) of the Act.

Martinez was terminated on July 25 by Respondent, allegedly for threatening Lehman. Employees, including the credible Carter, testified that Lehman was drunk that morning. McKeown when learning from Lehman that he had fired Martinez because of a threat against his life, backed up Lehman and followed through on the discharge. McKeown was not there at the time of the alleged threat, Lehman never testified at the hearing, nor did any other witness testify that Martinez had indeed uttered any threat. McKeown himself testified that he spoke to several employees who said that there had been an argument but that they could not hear what was said because of the noise of the machinery. I find, in the circumstances, that Respondent has not established its asserted reason for the discharge and rather, Respondent discharged him because of all the activities in which he had been engaged. By such conduct it violated Section 8(a)(3) and (4) of the Act.

2. The discharge of Joseph Lanusse

Lanusse had been employed for 12 years and at the time of his discharge on May 31, 1979, he operated the centerless grinder. On that day he had refused an order from Lehman to train Carter on that machine. Lehman fired Lanusse, but he would not leave. Lehman then reported to McKeown who came and himself asked Lanusse to train Carter, and, when he refused, fired him.

At the outset, this would seem to be a simple matter of disobedience by an employee who was therefore discharged, but it is not all that clear. Lanusse had been involved in January with the union activities. On May 30, the day before his discharge, a time when the employees again were discussing joining the Union, Lanusse signed an authorization card. It has already been established

⁹ *N.L.R.B. v. Clapper Manufacturing, Inc.*, 458 F.2d 414, 417 (3d. Cir. 1972).

¹⁰ *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 803 (1945).

that Respondent, by Mathes and the supervisors, was aware of the union activities of its employees as a result of surveillance, interrogations, and other unlawful conduct. In any case, the small plant doctrine can be invoked in this situation of merely 16 employees so as to infer knowledge.¹¹

Moreover, other evidence tends to indicate that this was not a normal discharge for refusing to obey an order. Scott Reimer, an employee, testified that the day before Lanusse was fired, during a conversation with McKeown concerning the problems in the shop, the latter mentioned that anybody could be fired and that no one is irreplaceable. More direct, however, is the credible testimony of Carter, the employee to be trained, who stated that the fact of the matter was that he had operated the centerless grinder when he first was employed by Respondent and he knew how to work that machine. In addition it was well known in the plant that Lanusse had an aversion to training other employees, feeling he was not paid enough to do that work, and he had indeed complained to Mathes about the situation. Lanusse, himself, as well as other employees including Gleason, another old timer, had refused to train employees previously and had suffered no discipline, let alone discharge. I find therefore, that the reason offered for the discharge, despite the disobedience of Lanusse, was pretextual and, in this instance, he had been treated disparately. In view of the ongoing union activities, the knowledge of Respondent, the fact that the discharge followed by only 1 day his signing a union card, the many other independent violations of Section 8(a)(1), I find that Respondent discharged Lanusse for his union activity, and therefore violated Section 8(a)(3) and (1) of the Act.

3. The termination of Michael Tomasch

Tomasch who was terminated on June 20, 1979, was hired as an apprentice approximately 1 year before. He worked full time during his first summer and then part time when the school term began in the fall, since he was hired in connection with a program initiated by his school through which a student received training in a job and obtained academic credit for the time spent in that process. In order to receive school credit, evaluations of his work were submitted by Lehman and Mathes, all of which were uniformly good.

Tomasch was paid \$3.75 an hour and received a raise with the other employees after the meeting in January when Mathes granted all employees a 5-percent increase. During the summer he had worked full time and also some overtime and at Christmas received a bonus as did other employees.

Tomasch participated in the union activities with the other employees; he signed the petition calling for a meeting with Mathes; attended the meeting of all employees held by Mathes in January 1979; signed an authorization card on June 5; was one of the employees interrogated by McKeown concerning whether he had given Martinez permission to use his name in the charge filed against Respondent; and appeared with a group of

employees along with the union representative who demanded recognition on June 19.

On June 20, Tomasch, as did other employees, wore a union button in the plant. Lehman told him not to wear the button because he was only a part-time employee. Later that day he was called to the office by McKeown who asked when he was going to graduate from high school. When Tomasch replied it was that night, McKeown told him not to come into work the next day. McKeown indicated he was just following orders and that this was in the nature of a layoff. Tomasch returned to the plant about 2 weeks later having seen Respondent's advertisement for lathe operators. He showed it to McKeown and asked him for his job back, but McKeown said there was no work for him. Martinez was in the area and he also asked McKeown to rehire Tomasch or permit him to file an application, but McKeown refused.

Respondent contends that Tomasch was merely terminated because its agreement with the high school only calls for teaching the student until the date of graduation. I am not persuaded by this contention. Tomasch testified without contradiction that he had been told only a month before his termination by Mathes that he would be getting a permanent job and a raise in pay. In addition his evaluations were good, and even McKeown testified that Tomasch had performed good work. It is incredible that Respondent could have trained an employee to do work on lathes, have him advance to a point where he performed creditably, and then terminate him in mid-week at the same time that it was running advertisements for lathe operators. I find rather that Tomasch was terminated because of his participation in union activities and because he was named in the filing of the charge by Martinez, and thereby Respondent violated Section 8(a)(3) and (4) of the Act.

4. The discharge of James Callahan

Callahan was hired on June 25, 1979, also in accordance with the cooperative education program at the local high school. He was paid the apprentice wage of \$4 an hour and was to work full time during the summer and part time during the school year. Callahan testified that when he was hired, Lehman informed him he would work under the school program and after he finished school he would be given steady employment. Callahan also testified that on the second day of his employment Michael Colombo told him about the Union and asked him if he would like to wear a union button. The union button came up in the context of Colombo offering one to Lehman while the three of them were in the same area. Lehman said he could not wear the union button and Colombo then suggested it be given to Callahan. Lehman said they cannot do that because Callahan is an apprentice and is only learning.

On the same day Martinez asked him if he would like to join the Union, and Callahan repeated to Martinez what had happened between Lehman and Colombo. Martinez then went to talk to Lehman and after some discussion, which Callahan observed, Martinez returned and said he was allowed to join the Union because he

¹¹ *Wiese Plow Welding Co., Inc.*, 123 NLRB 616 (1959).

was working there even though only learning. Lehman then came over and informed Callahan he had told Colombo that he is not allowed to sign for the Union because he did not work there yet. Lehman also asked him why he had told Martinez what Lehman had said to Colombo. Callahan did sign an authorization card on June 26.

Callahan was terminated on July 6, after 2 weeks of employment, by Lehman and McKeown who told him he was being laid off for lack of work and they would call him the following week. As they did not call, he did and was told by McKeown that he was on indefinite leave. When Callahan asked if he was being fired, McKeown laughed. Callahan stated that the day before his discharge he informed Ritterman, the coordinator of the school program, that he had joined the Union. Ritterman was making his first visit to the shop since Callahan began working there. Callahan informed him that there were a lot of problems in the shop, that a union was being formed and he was joining it. Ritterman then left him to speak with Mathes and shortly thereafter returned, observed how he was working, and said something like keep up the good work.

McKeown testified concerning his termination of Callahan stating that he had laid off Callahan because he was inadequate. McKeown also stated that Callahan worked only 2 days but an employee can be evaluated in such a period of time. He said Callahan was unable to handle a micrometer, something he should have learned in school. Obviously McKeown had no real recollection of the Callahan affair particularly when he insisted that Callahan had only worked 2 days rather than 2 weeks. In view of open discussion concerning Callahan joining the Union and the question as to whether he could wear a union button, all conducted with Supervisor Lehman, it is clear that Respondent had knowledge of Callahan's activity. I find that Respondent having terminated Callahan shortly after this activity occurred, including his signing of a card, and the day after Callahan had so informed Ritterman, this action was taken because of his union activity and not his alleged inadequate performance. As to the latter, it must be borne in mind that Callahan was hired pursuant to an apprentice program and presumably would have been given some period of time within which to learn the job. Noting that by this time Respondent had committed many violations, I find further that by its discharge of James Callahan, Respondent violated Section 8(a)(1) and (3) of the Act.

5. The layoff of Scott Reimer

Scott Reimer was hired as an apprentice in December 1978. Apparently he did not take part in the early activities of December 1978 and January 1979, but after Lannusse was fired, an incident at which he was present, Reimer became active. Martinez spoke to him about the Union and gave him a card to sign, which he did on June 5. He then went to union meetings, wore a union button, and was part of the group who accompanied the union representative when recognition was demanded. The day after the recognition demand, his overtime was cut, ostensibly for lack of work, but Reimer contends there was plenty of work available. His testimony about

the loss of overtime is substantiated by the payroll records which reveal that in the weeks preceding June 19, his weekly overtime most often was in double digits, while thereafter it dwindled to 3 hours. In addition Respondent changed Reimer's hours, a matter of some importance to him. Apparently he had a long trip to the plant and he had been coming in, with permission, at an early hour and leaving at a late hour so as to avoid a good deal of the traffic. One week in mid-July, his overtime was restored so that he worked overtime on 3 days plus Saturday but this was stopped again and ultimately he was laid off on July 20, having been told by McKeown and Lehman that there was a lack of work.

Reimer also testified without contradiction that he had been promised a pay raise for July 1 and, when he inquired about it, he was told by Mathes that on advice from his lawyer he could not grant him a wage increase because of the pending union problem.

I find, under the circumstances, that Respondent violated Section 8(a)(1) and (3) of the Act by reducing Reimer's overtime and changing his work hours. Although Respondent has contended that these incidents resulted from lack of work, it never substantiated that claim with any appropriate evidence. For example with respect to the cuts in overtime, the records show that other employees continued to receive a substantial amount of overtime during the period that Reimer's was cut. Cutting overtime and changing Reimer's work hours, so as to impose more arduous working conditions on him immediately after his union activity, violated Section 8(a)(3) of the Act.¹² In this connection it is also noted that Respondent did not deny Reimer had been promised a wage increase on July 1, and Mathes refused to give it to him because of the pending union situation.

Reimer's layoff on July 20 presents a different problem. By his own testimony, Reimer said he asked McKeown within a week or two of his layoff to give him a raise or lay him off. He said that he wanted out. But McKeown said he could not do anything without talking to Mathes. Reimer stated he was not making enough overtime, that he needed the overtime and also the promised raise which he had not received. Finally Reimer said he felt he was in the middle because he was a friend of Mathes' daughter on the one hand and on the other hand the union adherents were pressuring him to go to meetings and partake in their activities. In these circumstances I am unable to find that, merely because Respondent's stated reason was "lack of work," the layoff itself was discriminatorily motivated. It could have been a mode of accommodating Reimer's request to be laid off, in view of his relationship with Mathes' family. Accordingly, I shall dismiss so much of the complaint which alleges that Respondent violated Section 8(a)(1) and (3) of the Act by laying off Scott Reimer on July 20.

6. The discharge of Ann Colombo

Ann Colombo was employed since June 1977 as the bookkeeper and secretary to Mathes, being the only office clerical employee of the Company. As has been

¹² *Pinter Bros., Inc.*, 233 NLRB 575 (1977).

previously noted she is the wife of Michael Colombo. She performed all the secretarial and clerical duties of the office. She prepared the payroll, did bookkeeping, opened mail, answered telephones, typed correspondence, and performed filing, and other functions in connection with bids that Respondent made for its jobs.

Respondent contends that it terminated Ann Colombo because she was a confidential employee who had been leaking confidential information to employees in the plant. This contention creates a threshold issue as to whether Colombo was indeed a confidential employee as defined by the Board. The Board has long held that an employee is "confidential" if he or she assists and acts in a confidential capacity to persons who "formulate, determine, and effectuate management policies in the field of labor relations." *The B. F. Goodrich Company*, 115 NLRB 722, 724 (1956). While conceding that Mathes, as the owner and Respondent, clearly determines and effectuates labor relations policies, the General Counsel argues that Ann Colombo did not act in a confidential nature to Mathes in the way contemplated by the Board in *B. F. Goodrich*. The General Counsel argues that doing work in connection with payroll and other financial matters is not sufficient to establish such status inasmuch as Ann Colombo did not open correspondence marked "confidential" nor is there any evidence that she was involved in grievances or other labor relations matters. I find no merit in this contention of the General Counsel's. The physical situation must be borne in mind before a determination of this nature is reached. Thus, we have an individual such as Mathes who is in sole control of a small business with a limited number of employees. There was no established collective-bargaining relationship and, consequently, there were no dealings with unions or formal grievances with which Colombo would have contact as secretary to Mathes. On the other hand, she occupied a desk in the immediate and open proximity to Mathes. She could not help but be privy to conversations involving labor and personnel matters.

Her own testimony reveals the extent of this participation. Thus, she stated that Mathes told her this Union was not a good one. It will be recalled that all employees received a wage increase immediately after the January meeting, except Martinez, and, in this connection, Mathes told Ann Colombo that Martinez had received a previous raise and that is why he did not get it this time. She was present, she testified, when Mathes received the initial charge in this proceeding and told McKeown to fire Martinez and after McKeown counseled against this step, Mathes told him to cut Martinez' overtime. Likewise she was present when Mathes instructed McKeown to question employees as to whether they had given Martinez permission to use their names in the charge. There are other examples of this already noted above. I find, therefore, in the circumstances, because of the nature of her position as the sole secretary, bookkeeper, and office employee, and in view of the job duties connecting her with Mathes and his work, that Ann Colombo was a confidential employee as defined by the Board.

The next question is whether confidential employees, who are clearly excluded from bargaining units of other employees, are nevertheless entitled to the protection of

the Act. Relying on the fact that Section 2(3) of the Act does not state that confidentials are not employees as defined in the Act, while the same section specifically excludes certain other types of employees, the Board has held that confidential employees are entitled to the safeguards afforded by the Act.¹³

Having found that Ann Colombo is a confidential employee entitled to protection under the Act, there remains the issue as to whether she was discharged because of the union activities of her husband, Michael Colombo, or rather the breach of her confidential relationship with her employer. Mathes testified that he discharged Ann Colombo on July 27 because he had lost confidence in her and because she had leaked confidential information to the employees in the plant. He said that one day he wrote on an order "no bid at this time," and that information came back to him from the shop through McKeown on the same day. This incident allegedly occurred sometime before the day of discharge, but Mathes claimed he had been thinking about terminating her for a long time and finally decided on July 27.

However in seeking to determine the cause of her discharge, it is necessary to look at events much before the actual date of the termination. Thus it has already been found that Mathes unlawfully interrogated Ann Colombo in January on the evening of the employees' union meeting. She also testified to the incident in June at lunch time when her husband, Mike Colombo, introduced her to a union representative. When she returned from lunch, Mathes wanted to know where he stood, and asked her for his keys. At the same time he changed her work hours from 8:30 a.m. to 5 p.m. rather than 8 a.m. to 4:30 p.m., creating a commuting problem for her since she normally came to work with her husband. I do not credit Mathes' testimony that he took away the keys from Ann because he was doubtful about her loyalty, rather than because he saw her talking to a union representative. In this connection, it is noted that he did not deny having seen her talk to the union representative. Nor do I credit him when he stated that he changed her hours because he wanted her to be in later while he was recuperating from his heart condition. This action occurred in June, yet Mathes testified that he had been out with his illness for 10 days in February and was in the hospital from March 26 through April 5. Apparently he did not deem it necessary to change her hours until June, and then the difference was only a one-half hour. I find in the circumstances that Respondent violated Section 8(a)(1) and (3) of the Act by changing Ann Colombo's working hours and conditions, because of the union activities of her husband.

As to her termination, I do not credit Mathes again that this action was taken because of his loss of confidence in her because she was leaking information. He stated that he was thinking about doing this for a long

¹³ *Wheeling Electric Company*, 182 NLRB 218, 220-221 (1970), enforcement denied 444 F.2d 783 (4th Cir. 1971). Thereafter the Seventh Circuit denied enforcement of another case on this point, *Peerless of America, Inc.*, 198 NLRB 982, 987 (1972), enforcement denied 484 F.2d 1108, 1112 (1973). Despite the refusal of two circuits to approve the Board's position in this matter, I am bound to follow Board law.

time and finally took the action on July 27, telling her he could not trust her. This of course was in the midst of a payroll week, and the alleged leak occurred a week or two before, according to Mathes. But Ann Colombo credibly testified that, on the date of her discharge, Mathes received a letter from the Board which contained another unfair labor practice charge in which her husband was named. Ten minutes later, he fired her, and when asked why said, "I have a feeling." Although Mathes testified that no particular incident occurred on the day of her firing, he did admit that he spoke to her about her husband at that time, referring to him as a "macho man," and telling her that he hoped she would not be sorry some day. In the context of the timing and circumstances of this discharge, and the prior unlawful changes of Ann Colombo's working conditions, I find Respondent's assertion that she was terminated because Mathes lost confidence in her to be a pretext. Accordingly, I further find that Respondent discharged her because of the union activities of her husband, Michael, and consequently violated Section 8(a)(1) and (3) of the Act.¹⁴

7. Michael Colombo

Colombo had been employed for about a year as a machinist and was supervised by Lehman. He was heavily involved in the union activities in January and thereafter, and knowledge of Colombo's activities was admittedly known to management and Respondent. When Lanusse was fired on May 31, Colombo told Lehman that this was no way to treat someone after 12 years and Lehman promptly told him to shut up. A couple of days later Lehman told Colombo that he would not work Saturday or overtime again. This was credibly testified to by Colombo and of course Lehman did not testify at the hearing. Examination of the payroll records reveals that Colombo had some overtime in every week through the week ending June 2. Thereafter he received no overtime at all, while other employees continued to work considerable amounts of overtime. I find that Respondent violated Section 8(a)(1) and (3) of the Act by depriving Michael Colombo of overtime after he complained to Lehman concerning the discharge of Lanusse on May 31.

On June 26, Colombo became involved in an argument with another employee, Tipton, at lunchtime outside the premises. Tipton was about to quit his job and the other employees were urging him to stick it out because of the union campaign. This resulted in a heated discussion between Colombo and Tipton during which Mathes came up and told Colombo to shut up. An argument then ensued between Colombo and Mathes in which they exchanged epithets. I have credited the testimony of Carter and other employees that Mathes went inside and McKeown came out a few minutes later and told him he was fired for having threatened the life of Mathes.

¹⁴ Since confidential employees are not bereft of the protection of the Act, *Wheeling Electric Company, supra*, Respondent's conduct violated Sec. 8(a)(3) as well as Sec. 8(a)(1), because discharging the wife of a leading union adherent clearly tends to discourage union activity. cf. *General Truck Drivers, Chauffeurs and Helpers Union Local No. 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (Absco Distributing)*, 209 NLRB 1144 (1974), where the Board reversed on other grounds a finding of 8(a)(1)(A) and 8(b)(2) violations involving an attempt by a union to obtain discharge of a confidential employee.

Mathes testified that, after talking later with counsel, he was advised to take back Colombo. Accordingly, McKeown called Colombo at home and told Ann that her husband should return to work the following day, which he did.

In his testimony Mathes did not mention any threat made to his life during the argument, which, incidentally, centered around the question as to what Colombo and the other employees could or could not do during their lunchbreak. McKeown did not hear or testify to a threat, nor did any of the employee witnesses. Mathes stated that when he returned home that evening, he found on his telephone recorder a threat to his life which he claims had been left in a message from someone who sounded like Colombo. There is no probative evidence that Colombo did make such a telephone threat. Accordingly, I do not credit the stated reason for this discharge and conclude that it was implemented because of Colombo's involvement in union activities and therefore in violation of Section 8(a)(1) and (3) of the Act. This conduct further violated Section 8(a)(4) of the Act because by that time Colombo had already been mentioned in the charge filed by Martinez, and he had been interrogated about it along with the other employees.

Having been reinstated, Colombo returned to work and then went on vacation for 1 week until July 23. Upon his reporting for work, he was told by Lehman that he was being laid off for lack of work. It has been previously noted that Respondent advertised for employees to work on the centerless grinder both on June 17 and on August 9. Colombo had operated this machine before. In connection with his testimony concerning the layoff of Scott Reimer, who was laid off on the same day as Colombo, McKeown testified that no one had been laid off for lack of work while he was with the Company the last year and a half. McKeown also testified that he had seen Colombo working on the centerless grinder as well as the surface grinder, and there was no particular time of the year when the business was slow. I find in the circumstances that this layoff of Colombo was another incident in the campaign to get rid of or harass union supporters, and consequently was again in violation of Section 8(a)(1), (3), and (4) of the Act.

While still on layoff, Mike Colombo came to the plant to pick up his wife, Ann, who was terminated on July 27. Both testified that he was there only a very short time while she gathered her effects and they left together. Mathes again stated that Colombo threatened his life and his family, and that he drew his finger across his throat to illustrate what he would do to Mathes. McKeown testified he heard voices but could only distinguish the last words of Colombo, which were threatening to Mathes. I find that the versions of Mathes and McKeown are incredible. McKeown's testimony was evasive and not always coherent. Mathes, when asked whether he had called the police with regard to this alleged threat on his life, replied that he did this after he came home when he heard the tape recording of the threat. He had previously testified that the tape recording occurred on June 26 when he first discharged Colombo. In view of my credibility findings concerning

these incidents, and as I have also found that Mathes discharged Ann Colombo on July 27 because of the union activities of her husband, I further find that he discharged Michael Colombo that evening by telegram, because of his union activities and because he had been named in an unfair labor practice charge, thereby further violating Section 8(a)(1), (3), and (4) of the Act.

8. Karl Bertram

Karl Bertram was one of the employees interrogated by McKeown on June 7, as to whether he had given permission to Martinez to use his name in the unfair labor practice charge. He was the only one of the employees questioned who acknowledged that he was aware of the charges and permitted Martinez to use his name. All the employees named were written letters dated June 14, but the letter written to Bertram was different from the others. Bertram had annually been permitted to take an extended vacation. The letter he received reviews the discussion on June 7 with McKeown, sets forth the benefits he had obtained from the Company, including his vacation extensions, and concludes by informing Bertram that his extended vacation cannot be permitted. It is clear then from the letter written by Mathes that Respondent denied Bertram a benefit, which he theretofore had received, because of his activity in permitting Martinez to use his name in an unfair labor practice charge. By this conduct Respondent has further violated Section 8(a) (1), (3), and (4) of the Act, and I so find.

IV. THE CHALLENGED BALLOTS IN THE REPRESENTATION CASE

The report on challenged ballots and the erratum thereto issued by the Regional Director found that the challenges to the ballots of six individuals raised substantial issues which warranted a hearing.

A. Louis Martinez, Michael Colombo, and Joseph Lanusse

These three individuals were challenged because their names did not appear on the eligibility list. Having found that all three were discriminatorily discharged in violation of Section 8(a)(3) of the Act, by Respondent prior to the election, and thereby entitled to reinstatement, I further find that they were eligible to vote in the election conducted on August 6, 1979, and therefore recommend that the challenges to their ballots be overruled.

B. Michael Tomasch and James Callahan

Both of these individuals were challenged because their names did not appear on the eligibility list and I have found that they were discriminatorily discharged by Respondent on June 20 and July 6, respectively, and are entitled to reinstatement. However, both of them had been enrolled as full-time students at a vocational high school in New Jersey under a Cooperative Industrial Education and Special Needs Program. Actually, they were not employed at the same time but rather Callahan was the successor to Tomasch after the latter had been discharged. Under the program, Respondent entered into

a training agreement in which it agreed to employ the students for the purpose of training as machinists. During the summer months they worked full time, but part time while school is in session. Respondent is responsible to prepare progress reports at intervals and permit the teacher coordinator, in this instance Ritterman, to come to the premises and observe and evaluate the student. The record reveals that with respect to Tomasch, Respondent submitted regular evaluations prepared by Lehman and Mathes. Students are paid at a much lower hourly rate than regular employees and do not share in any of the benefits received by those employees. The Board has held in an almost identical situation evolving from the same program in New Jersey that the relationship between the employee and Respondent is "more as an educational rather than as an employment relationship where the circumstances affecting the performance of work are subject exclusively to an employer's right of control."¹⁵ Accordingly, despite the fact that I have found that James Callahan is entitled to reinstatement, I shall recommend that the challenge to his ballot be sustained.

However, I find the circumstances to be somewhat different in the case of Michael Tomasch. It appears that he had completed his period as a student employee at the time he was discharged. Respondent had received a letter dated June 6, 1979, from the high school which noted that Tomasch would be completing high school and graduating on June 20. Actually this was stated by Respondent as the reason for his termination on that date. I have found that on the basis of the credible evidence, Tomasch had been assured by both Lehman and Mathes that he would have continued employment and a steady job on his completion of the education program and graduation. He had, therefore, every expectancy of continued employment as a full-time employee which he would have attained upon graduation, but for the unlawful discrimination, and prior to the election. I shall therefore treat Tomasch as a regular full-time employee as of the date of the election and recommend that the challenge to his ballot be overruled.

C. Leonard Ernst

The Union challenged the ballot of Leonard Ernst contending that he is a supervisor. The record reveals that Ernst has been employed since 1951 and does internal profiling on lathes and polishing work. He is paid hourly and receives the same benefits as other employees. He receives a much higher rate of pay and a considerably larger bonus than other employees. He wears work clothes, punches a clock except at lunchtime, receives time and a half for overtime, and spends almost the entire day working on machines. In addition, particularly with regard to polishing, he will assign some of the work to other employees when they are needed to help him out, and when the higher work loads runs out, he sends them back to Lehman who will then assign other work. It appears that he also trains new employees with regard to the polishing and lathe work that he does.

¹⁵ *Towne Chevrolet*, 230 NLRB 479, 480 (1977).

In support of its challenge, the Union relies principally on some evidence to the effect that Ernst hired an employee, Tipton. According to Ernst, he had told McKeown that another man was needed in polishing, and one day Ann Colombo asked him to talk to an applicant, Tipton, and see whether he could do polishing. He took Tipton to a machine, tried him out, and then returned and said that Tipton would be able to do the job. Ernst states that McKeown actually did the hiring of Tipton. On the other hand, Ann testified that Ernst told her to hire Tipton and specified the rate of pay and starting date. McKeown also stated that he had asked Ernst to interview and evaluate Tipton, and Ernst reported that Tipton could handle the job and then went back to the shop. McKeown then hired Tipton and told him when to report. There is, therefore, some conflict as to who actually hired Tipton and I find that it has not been shown by preponderance of the evidence that Tipton was indeed hired by Ernst. In any case, assuming that Ernst actually did hire Tipton, and it is noted that Mathes was out ill at the time, the single exercise of such power by an employee over a span of more than 20 years is insufficient to establish supervisory authority. In this connection it is also noted that there is no probative evidence that Ernst hired any other employee, fired any employee, or effectively recommended such action. Nor does it appear from this record that Ernst recommended discipline or, in this small shop, responsibly directed the work of other employees. Much ado was raised about the fact that unlike other employees, Ernst did not punch in and out at lunchtime but this is explained, without contradiction, by the fact that he always ate his lunch indoors. Nor does the fact that his bonus was larger and he received an additional holiday create the indicia of supervisory authority. Accordingly, I find that Ernst is not a supervisor within the meaning of Section 2(11) of the Act and I shall recommend that the challenge to his ballot be overruled.

Having sustained the challenge to the ballot of Joseph Callahan, and having overruled the challenges to the ballots of Martinez, Colombo, Lanusse, Tomasch, and Ernst, I shall recommend that the representation proceeding be remanded to the Regional Director with the direction to open and count these five ballots, and prepare a revised tally, including therein the count of said ballots, on the basis of which he shall then issue the appropriate certification.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be or-

dered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discharged Joseph Lanusse, Joseph Callahan, and Ann Colombo in violation of Section 8(a)(1) and (3) of the Act, and also discharged Louis Martinez, Michael Tomasch, and Michael Colombo in violation of Section 8(a)(1), (3), and (4) of the Act, I recommend that Respondent be ordered to offer them reinstatement and to make them whole for any loss of earnings and other benefits resulting from their discharge by payment to them of a sum of money equal to the amount they normally would have earned as wages and other benefits from the dates of their discharges to the dates on which reinstatement is offered, less net earnings during that period. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).¹⁶

I have also found that Respondent violated Section 8(a)(1) and (3) by cutting the overtime of Scott Reimer; by refusing a wage increase to Louis Martinez in January 1979 and thereafter cutting Martinez' overtime in June and changing his work hours in July (these latter violations in June and July also being violative of Section 8(a)(4) of the Act); by laying off Michael Colombo on July 20, also in violation of Section 8(a)(4), and in addition having given Colombo less overtime in June and July; and finally by rescinding the extended vacation privilege in June and July 1979 of Karl Bertram. I shall recommend that Respondent make these employees whole for any losses they may have sustained as a result of such discriminatory conduct.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is labor organization within the meaning of Section 2 (5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by:
 - (a) Coercively interrogating employees concerning their union and other protected activities.
 - (b) Creating the impression that it kept the activities of employees under surveillance.
 - (c) Promising and granting wage increases and other benefits to employees in order to discourage them from selecting the Union as their collective-bargaining representative.
 - (d) Threatening to close its plant should the employees select the Union as their collective-bargaining representative.
 - (e) Threatening employees with loss of their jobs and discharge should the employees select the Union as their representative.
 - (f) Soliciting grievances from employees in order to discourage their union activities.
 - (g) Refusing to permit employees to wear union buttons and insignia while at work.

¹⁶ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

(h) Preventing employees from soliciting on behalf of the Union during nonworking time.

(i) Admonishing employees of the futility of selecting the Union as their bargaining representative.

4. Respondent violated Section 8(a)(3) and (1) of the Act by discharging Ann Colombo, Joseph Lanusse, and Joseph Callahan because of their union activities. Respondent further violated Section 8(a)(1) and (3) by refusing a wage increase to Louis Martinez in January 1979, and reducing the overtime and changing the hours of Scott Reimer, also because of their union activities, and by changing the work hours of Ann Colombo because of her husband's union activities.

5. Respondent violated Section 8(a)(1), (3), and (4) of the Act by discharging Louis Martinez, Michael Tomasch, and Michael Colombo. It further violated the Act by cutting the overtime of Louis Martinez, laying off Michael Colombo on July 20, and rescinding the extended vacation privilege of Karl Bertram, all because of the union activities of these employees and because they filed charges or were mentioned in charges filed under the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Except as is set forth above, Respondent has not otherwise violated the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁷

The Respondent, Firmat Manufacturing Corp., Englewood, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union activities.

(b) Creating the impression that it is keeping the activities of its employees under surveillance.

(c) Promising and granting wage and other benefits in order to discourage employees from selecting the Union as their collective-bargaining representative.

(d) Threatening to close its business if its employees select District 65, Distributive Workers of America as their collective-bargaining representative.

(e) Threatening employees with loss of employment because of their union activities.

(f) Soliciting grievances from employees to discourage employees from selecting the Union to represent them.

(g) Refusing to permit employees to wear union buttons or other insignia.

(h) Preventing employees from soliciting on behalf of the Union during nonworking time.

(i) Admonishing employees of the futility of selecting the Union to represent them.

(j) Discharging or otherwise discriminating against employees because of their union activities.

(k) Discharging or otherwise discriminating against employees because they filed charges or were named in charges filed under the Act.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Louis Martinez, Joseph Lanusse, Michael Tomasch, Joseph Callahan, Ann Colombo, and Michael Colombo immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Make whole Louis Martinez, Scott Reimer, Ann Colombo, Michael Colombo, and Karl Bertram for any losses they may have sustained by reason of the various acts of discrimination other than discharge practiced by Respondent against them.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(d) Post at its Englewood, New Jersey, place of business copies of the attached notice marked "Appendix."¹⁸ Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed as to those allegations not specifically found to be violative of the Act.

IT IS FURTHER ORDERED that Case 22-RC-7923 be remanded to the Regional Director with a direction to sustain the challenge to the ballot of Joseph Callahan; and to open and count the ballots of Louis Martinez, Michael Colombo, Joseph Lanusse, Leonard Ernst, and Michael Tomasch; and thereafter to prepare and cause to be served on the parties a revised tally of ballots, including therein the count of said ballots, on the basis of which he shall then issue the appropriate certification.

¹⁷ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹⁸ In the event that this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."